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Supreme Court, U.S.
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No. 04-1053

IN THE

# Supreme Court of the United States

KENNETH A. GOLDBLATT,

*Petitioner*,

*v.*

A & W INDUSTRIES, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION

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## PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petitioner's list of interested parties contained on page (iii) of his Petition is correct.

Respondent, A & W Industries, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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## INTRODUCTION

Respondent ("A&W") disagrees with Petitioner ("Goldblatt") in his characterization of the question presented on page (i) of the Petition that the bankruptcy court granted an exception to discharge of a state court judgment for "civil conspiracy to *breach a contract*" as that was not the basis of the state court judgment against him and others. In addition, Goldblatt claims that he ". . . did not participate in any action alleged by the creditor to be a conspiratorial act directed toward the creditor." This statement is directly contrary to the record before this court.[1] The bankruptcy court[2] agreed with the state court and found that Goldblatt was an active participant in the conspiracy.

A&W obtained a money judgment against Goldblatt and other parties in a state court for conspiracy to commit fraud against A&W, which was willful, and malicious, and which knowingly caused A&W to suffer damages. Goldblatt filed a bankruptcy proceeding to discharge the judgment debt. A&W filed an objection to discharge of the judgment debt under 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(6) of the Code. The bankruptcy court granted a summary judgment against Goldblatt for the relief sought by A&W under subparagraph (a)(6) in a well reasoned Memorandum Opinion

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[1] Judgment, Appendix C, parag. 5, pg. 13, with actual damages and punitive damages. Findings of Fact and Conclusions of Law, Appendix D, parag. 23, 24, 25, 27, 28 and 29, on pgs. 23 – 24. Opinion by State Court of Appeals, Appendix E, pgs. 47 – 59. The trial court's findings of fact, conclusions of law and judgment were supported by the evidence. Appendix E, pg. 50.

[2] Memorandum Opinion of Bankruptcy Court [Petitioner 's Appendix H, pg. 134 –136].

[Appendix H] that relied on the state trial court's findings of fact and conclusions of law under the doctrine of issue preclusion [Appendix H, pg. 128 – 129, and Appendix I, ¶ 6 and 8, pg. 142 – 143]. The bankruptcy court's judgment was affirmed by the district court [Appendix K, pg. 147], and by the court of appeals [Appendix_M, pg. 151].

The Court of Appeals correctly affirmed the bankruptcy court's determination that A&W's judgment debt against Goldblatt was non-dischargeable under 11 U.S.C. § 523(a)(6). The bankruptcy court correctly relied upon both existing state law, valid federal case law and a correct interpretation of § 523(a)(6) of the Code to enter judgment on A&W's complaint against the debtor.

Thus, Goldblatt's claims in his petition fail on the merits and rely, in part, on a misstatement of the record.

## REASONS FOR DENYING THE PETITION

I. *The Court of Appeals Did Not Commit Error.*

II. *The Bankruptcy Court Did Not Commit Error.*

III. *The Petition Does Not Merit Discretionary Review.*

## ARGUMENT

### I. The Court of Appeals Did Not Commit Error.

The circuit court of appeals reviewed the entire record before it, and found that the bankruptcy court's determination was legally and factually correct, and that error had not been

committed. Consequently, the court of appeals was compelled to affirm the lower court's decision.

Based on the record and the facts proved, the Court of Appeals correctly decided the case by affirming the bankruptcy court. [Appendix M, pg. 151] Mr. Goldblatt improperly "skews" the facts so that he can attempt to contend that this is a case of first impression and have the writ granted.

It is clear that Mr. Goldblatt was a direct, active participant in the conspiracy against A&W that intentionally attempted to deprive A&W of the business assets that it had legitimately purchased from Wilbert of North Texas, Inc. ("Wilbert" or "WNT"). In addition, Mr. Goldblatt conducted a fraudulent foreclosure of a mortgage lien that successfully prevented A&W from consummating the purchase of the real estate (second phase) where that business was located and operated. [Appendix H, pg. 120]. Thus, Mr. Goldblatt's argument is based on a false premise, and misstates the record and/or ignores the correct holding in the lower courts.

Mr. Goldblatt contends that the Fifth Circuit should have relied on the law in other circuits rather than its own precedent[3] in affirming the bankruptcy court. The *Miller* case, and its progeny, which was relied upon by the bankruptcy court and the Fifth Circuit Court of Appeals, is not in a real or direct conflict with the other circuits.[4]

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[3] *In the Matter of Miller*, 156 F.3d 598, 603 (5th Cir. 1998), 33 Bankr. Ct. Dec. 282, *cert. denied*, 526 U.S. 1015, 119 S. Ct. 1249, 143 L. Ed. 2d 347 (1999).

[4] *See* section III of this brief.

## II. The Bankruptcy Court Did Not Commit Error.

Based on the record and the facts proved, which are set forth in the Memorandum Opinion, the bankruptcy court did not commit error in granting A&W's cross motion for summary judgment against Goldblatt pursuant to 11 U.S.C. § 523(a)(6) of the Code [Appendix H, pg. 133 – 137].

Goldblatt argues that (a) this is a case of first impression; and (b) that because he did not have a direct, *contractual* relationship with A&W, then he can not be held liable for conspiracy to commit fraud against A&W, and that, as a consequence, the bankruptcy court must have erred. As to the second proposition that simply is not the law, either in the lower circuit courts, or the state of Texas. As stated in the opinion of the state court of appeals, conspiracy does not exist by itself as a separate tort, but must exist in conjunction with another separate wrongful act. [Appendix E, pg. 47]. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996); *Bradt v. Sebek*, 14 S.W.3d 756, 766 (Tex. App. – Houston [1st Dist.] 2000 pet. denied), *cert. denied sub nom.*, *Bradt v. Lilly*, 532 U.S. 905 (2001).

As to the first proposition, the Court is respectfully directed to *Matter of Davis (Sheerin v. Davis)*, 3 F.3d 113 (5th Cir. 1993), 29 Collier Bankr. Cas.2d 1306, 24 Bankr. Ct. Dec. 1108, opinion by Judge Higginbotham, which is factually similar to the case at bar. Sheerin sued Davis for conspiracy to commit fraud and breach of fiduciary duty in a Texas court and obtained a judgment because the defendant tried to "freeze out" the plaintiff, minority shareholder.[5]

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[5] *Davis v. Sheerin*, 754 S.W.2d 375, 382 (Tex. App. – Houston [1st Dist.] 1988, *writ denied*).

The parties were co-owners of the stock in a company and in certain land. In subsequent bankruptcy proceedings, the judgment was held to have preclusive effect when Sheerin sought to have the judgment excepted from discharge under § 523(a)(4) and (6). Because the lower court's holding as to sub-paragraph (4) was upheld, it was not necessary to reach the defendant's claims under sub-paragraph (6).

Next, Mr. Goldblatt attacks the state court judgment as being "factually flawed and legally erroneous"[6] so that it can not be used as a basis for collateral estoppel as to § 523(a)(6). Finally, Mr. Goldblatt contends that the bankruptcy court should not have relied on state law to establish the elements of A&W's complaint as to non-dischargeability of the debt under § 523(a)(6).[7]

First, federal law requires that the bankruptcy court must give full faith and credit to the state court judgment and its underlying factual basis. 28 U.S.C. § 1738. *Marrese v. Amer. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1984); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984).

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[6] On Page 2 of Goldblatt's Petition he contends that it was "chronologically impossible" for him to be a part of the alleged conspiracy. This contention constitutes a collateral attack on a *final* judgment. *Gober v. Terra + Corporation, infra.* Moreover, Goldblatt complains that the state court of appeals found facts in support of the non-jury verdict based on the findings of fact and conclusions of law that were supplied by implication. The Texas rules of civil procedure permit this. Tex. R. Civ. Proc. 299.

[7] On page 5 of Goldblatt's Petition he states that the bankruptcy court and appellate court erroneously sanctioned the use of state law over federal law when existing case law requires the opposite.

Second, the elements that are required to be shown on an objection to discharge under § 523(a)(6) are:

a) A willful, intentional injury, as distinguished from a negligent or accidental injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62, 118 S. Ct. 974, 977, 140 L. Ed. 2d 90, 38 Collier Bankr. Cas. 2d 1629 (1998). Thus, the actor must intend the *consequences* of his acts (*i.e.*, foreseeability), and not simply intend the act itself.

b) The injury must have been committed with malice. *In the Matter of Miller, supra.* However, malice is not limited to affirmative acts of ill will or spite but "may be *inferred* from objective circumstantial evidence which can override a defendant's protestations of good faith." *Brown v. Petrolite Corporation*, 965 F.2d 38, 47 (5th Cir. 1992) citing *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988). Malice can be *implied* from the acts and conduct of the wrongdoer *Knight Kitchen Music v. Pineau*, 149 B.R. 239 (D.C. Me. 1993), 23 Bankr. Ct. Dec. 1427 (where the debtor's conduct targets the creditor that will almost certainly cause harm); *Schutz v. Morris*, 201 S.W.2d 144 (Tex. App. – Austin 1947).

c) The injury must be suffered by the creditor or by its interest in property.

The Fifth Circuit has determined that in § 523(a)(6) cases, malice can either be express or implied based on the facts proven, and can be shown by *either* proof of an objective substantial certainty of harm, *or* a subjective motive to cause

harm. *In the Matter of Miller, supra* at 606.[8] The meaning of "malice" as applied to issue preclusion in § 523(a)(6) is controlled by federal law and not state law. *In the Matter of Miller, supra* at pg. 604.

The *Miller* case is controlling precedent. Moreover, *Miller* recognizes that if *implied* malice exists in a § 523(a)(6) case, then that can be sufficient even though there is no proven "bad [or evil] motive" present on the part of the debtor (*i.e.*, an express finding is not required). The court quotes with approval the definition of implied malice from *In re Nance*, 556 F.2d 602, 611 (1st Cir. 1977).

> There need be no showing of "*special malice*" toward the injured party, only that the act is done deliberately and intentionally, *in* knowing *disregard of the rights of another.*

(Emphasis added). Importantly, this Court will recall that "special malice" was not required in *McIntyre v. Kavanaugh*, 242 U.S. 138, 141, 37 S. Ct. 38, 61 L. Ed. 205 (1916). Under the facts that were found in this case by the state probate court [Appendix C and D], the state appellate court [Appendix E], and the bankruptcy court [Appendix H], Goldblatt's conduct was determined to have been committed willfully *and* maliciously, whether viewed either by an objective standard or by a subjective standard.

To be sure, Goldblatt contends that he was not part of the conspiracy, *in spite of the fact* that he authored and signed

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[8] A contrary holding can be found in *Markowitz v. Campbell* (In re Markowitz), 190 F.3d 455, 464 (6th Cir. 1999), and *Carrillo v. Su* (In re Su), 290 F.3d 1140, 1145 (9th Cir. 2002) which rejects the objective standard.

the very document by which all of the other state court defendants acted [Appendix E, pg. 57]. The May 30, 1994 Agreement provides that one of the conspirators' express purposes was for Goldblatt, acting as a Trustee for the other defendants, to re-acquire in Goldblatt's name, the business as an operating company [Appendix E, pg. 53],[9] that A&W had already purchased for $323,000.00 [Appendix E, pg. 66]. Mr. Goldblatt actively worked for this stated goal of re-acquiring the business and to frustrate A&W's intention to purchase the related real estate (a deferred phase in the Asset Purchase Agreement) that A&W occupied as a lessee of its landlord WNT.

Thus, Goldblatt *intended* that A&W suffer the harm that was planned and took overt, targeted, methodical steps to carry out this plan [Appendix D, pg. 24, ¶27]. By definition, these proven actions constitute malice since Mr. Goldblatt knew that A&W had paid the estate executors $323,000 for the assets and that A&W had taken other active steps to try and finalize the purchase of the real estate. *See Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996); *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716 (Tex. 1995).

Under Texas law, one of the required elements for the imposition of exemplary damages is that the court must find that the actor committed either fraud, *malice*, or a willful act or omission. Tex. Civ. Prac. & Rem. Code § 41.003(a) (Vernon 1997). Malice is defined in § 41.001(7). Mr. Goldblatt satisfied the state statute under both prongs of

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[9] "The parties agree that the purpose of this Agreement is two fold: First, to recover Wilbert of North Texas, Inc. intact as an operating company owned by Kenn Goldblatt, Trustee."

the subjective or objective test that has been established by the Fifth Circuit.

*In re Performance Nutrition, Inc.*, 239 B.R. 93, 115 (N.D. Tex. 1999), 42 Collier Bankr. Cas. 2d 1652, involved claims of breach of fiduciary duty, tortious interference with contract relations, and civil conspiracy. Judge Abramson discussed the awarding of exemplary damages when such acts are found and stated:

> Malice has been defined in case law as "ill-will, spite, evil motive, or purposing the injury of another." Armendariz, 553 S.W.2d at 407. However, the Texas statute governing exemplary damages provides a much more extensive definition of malice. Under the Texas statute, malice is defined as "a specific intent by the defendant to cause substantial injury to the claimant; or . . . *an act or omission . . . which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and . . . of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.*" Tex. Civ. Prac. Rem. Code § 41.001 (Vernon 1998).

*Id.*, 239 B.R. at 115-16 (emphasis in the original).

The language in the Texas statute is the *same* standard that is currently used in the Fifth Circuit to determine if the

debt in question is dischargeable, or exempt from discharge under § 523(a)(6).

Because the judgment against Goldblatt contains an award of exemplary damages then it follows that the state trial court and the state court of appeals found *affirmative* evidence in the record that showed the existence of malice. If that evidence did not exist, then the exemplary damage award could not have been upheld against Goldblatt. As bankruptcy Judge Houser noted in her Memorandum Opinion [Appendix H, pg. 128 – 129], the state probate court expressly found that:

> Goldblatt "wrongfully and intentionally conspired to inflict injury on A&W," *see* Judgment, p. 2, ¶ 5 [Appendix C, pg. 13];
>
> A&W entered into the Commercial Lease Agreement attached as Exhibit "A" to the Agreement for Acquisition of Assets on the closing date of October 28, 1991, *see* Findings, p. 4, ¶ 15 [Appendix D, pg. 22];
>
> A&W substantially performed under the terms of the Obligation to Purchase provision of the Commercial Lease Agreement, *see* Findings, p. 5, ¶ 20 [Appendix D, pg. 22];
>
> Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day breached the terms of the Obligation to Purchase provision of the Commercial Lease Agreement entered into between A&W and Wilbert by terminating

negotiations and refusing to sell the Leased Premises to A&W at a price to be determined by appraisers, *see* Findings, pg. 5, ¶22 [Appendix D, pg. 23];

The breach of the Obligation to Purchase provision of the Commercial Lease Agreement between A&W and Wilbert was a result of a conspiracy to commit fraud among the following parties [including Goldblatt] to prevent A&W from being able to purchase the Leased Premises in accordance with the terms of the Obligation to Purchase provision of the Commercial Lease Agreement . . . , *see* Findings, p. 5, ¶ 23 [Appendix D, pg. 23];

The purchase of the Real Estate Lien Note from Landmark Life and subsequent foreclosure by Kenn Goldblatt of the Leased Premises was the result of a conspiracy to commit fraud among the following parties [including Goldblatt] to divest A&W of its right to purchase the Leased Premises in accordance with the terms of the Obligation to Purchase provision of the Commercial Lease Agreement . . . , *see* Findings, p. 6, ¶ 25 [Appendix D, pg. 23 – 24];

The following parties [including Goldblatt] were engaged in a conspiracy to defraud A&W evidenced in part by a written Agreement to cooperate to void the Agreement for Acquisition of Assets between A&W and Wilbert, and divest A&W of the assets it rightfully purchased from Wilbert . . . , *see* Findings, p. 6, ¶ 27. [Appendix D, pg. 24].

As can be seen, Judge Houser did not disagree with, question, or disturb these findings, but relied upon them when she entered her Order and Judgment. In addition, in discussing the evidence in the record the state court of appeals also held, *inter alia*,

> Findings of fact entered in a case tried to the court have the same force and dignity as a jury's answers to jury questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). [Appendix E, pg. 50].
>
> Thus, Goldblatt attempted to acquire 100% of WNT and the deed to the Dawn Lane property via the May 1994 agreement, and he contended at trial that he owned 100% of WNT. This evidence shows that all of the parties to the 48th Court lawsuit and the May 1994 agreement – Shirley, Indian Villages, the Klutz Trust, WNT, James, Ramona, and Goldblatt – agreed to make it impossible for WNT to sell the Dawn Lane property to A&W and fraudulently orchestrated the granting of the 48th court judgment to accomplish that [illegal] objective. This evidence further supports the trial court's conclusion that these appellants conspired to fraudulently void the asset acquisition agreement. [Appendix E, pg. 53 – 54].
>
> Because all of the appellants signed agreements with Goldblatt on the same day that would enable Goldblatt to recover WNT's assets and the Dawn Lane property, despite the existence of the 352nd court judgment, the trial court could reasonably

have *inferred* that all of the appellants conspired to commit a fraud upon the 48th court to prevent A&W from purchasing the Dawn Lane property in accordance with the terms of the commercial lease agreement. (emphasis added). [Appendix E, pg. 57 – 58].

As an appellate court, we must give effect to the trial court's *intended* findings if they are supported by the evidence, the record, and the judgment. *Black v. Dallas County Child Welfare Unit*, 835 S.W.2d 626, 630 (Tex. 1992). This rule is based upon well settled Texas law that in a nonjury trial every reasonable *inference* and intendment supported by the record will be drawn in favor of the trial court's judgment. *Id*. As we have discussed, there is ample evidence to support the trial court's *implied* findings that George and Shirley conspired to commit fraud. Further, fact findings on the ultimate and determinative fact questions of a case are not to be disregarded simply because they are mislabeled as conclusions of law. *McAshen v. Cavitt*, 149 Tex. 147, 229 S.W.2d 1016, 1020 (1950); *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585, 587 (Tex. App. – Eastland 1990, writ den.). We overrule all of appellant's issues concerning conspiracy. (emphasis added). [Appendix E, pgs. 60 – 61].

There is, however, ample evidence to support the trial court's conclusions that the breach of the obligation to purchase provision in the commercial lease agreement resulted from the

> appellants' conspiracy to commit a fraud upon the 48th District Court and that appellants are jointly and severally liable for any damages caused by their conspiracy. We have discussed this evidence at length in addressing appellants' challenges to the trial court's conclusions regarding conspiracy. *If appellants had not conspired to commit fraud, the commercial lease agreement would not have been breached, and A&W would not have suffered damages because of the breach.* The trial court's judgment awards A&W $150,000 in damages that were caused by the breach. Findings that the breach and the damages were the direct result of appellants' conspiracy may be *implied* from the above conclusions and this damage award. *See* Tex. R. Civ. P. 299 (providing that trial court's findings of fact shall form the basis of its judgment and that, when one or more elements of a ground of recovery have been found by the trial court, omitted, unrequested elements, when supported by the evidence will be *supplied* by presumption in support of the judgment); *see also Jefferson County v. Sterk*, 830 S.W.2d 260, 262 (Tex. App. – Beaumont 992, writ denied) . . .

(Emphasis added). [Appendix E, pgs. 80 – 81].

The state court of appeals clearly held under the facts proved, that Goldblatt's acts were willful, and objectively intended to harm the property interest of A&W with malice that was inferred from his conduct. That determination was supported by the proof that was adduced by A&W as part of its summary judgment record. It has been said that Mr. Goldblatt was the party most responsible since he was

the person who drafted the written agreement dated May 30, 1994 that bound all of the judgment debtors together and which was the central evidence that proved the elements of the conspiracy. In the state court of appeals' opinion it was stated:

> Moreover, in this case, Goldblatt, at the very least, had full knowledge of all the details of the conspiracy. Once a conspiracy is proven, each co-conspirator is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination. *Carroll*, 592 S.W.2d at 926; *McWhorter*, 993 S.W.2d at 787. Accordingly, appellants are all responsible for each other's acts committed in furtherance of the conspiracy.

[Appendix E, pg. 59]

***Issue Preclusion.***

The full faith and credit statute requires federal courts to accord a state court judgment the same preclusive effect that the judgment would have in a state court.[10] *Marrese v. Amer. Acad. Of Orthopaedic Surgeons*, *supra*; *Migra v. Warren City School Dist. Bd. Of Educ.*, *supra.* By definition, the doctrine of issue preclusion precludes the relitigation of an *issue* that has been actually and necessarily litigated and determined in a prior action. The doctrine does not permit a

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[10] 28 U.S.C. § 1738 provides that "The records and judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken."

party to relitigate the *facts* that make up the *elements* of that issue, as that would constitute a collateral attack on a prior judgment. *Gober v. Terra + Corporation (In re Gober)*, 100 F.3d 1195, 1201 (5th Cir. 1996), 11 Bankr Ct. Rep. 31.

> Under Texas law, collateral estoppel 'bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based on the same cause of action. *Bonniwell v. Beach Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984). Before applying collateral estoppel, the court must determine that the facts asserted in the second proceeding were fully and fairly litigated in the first, that the facts were essential to the judgment, and that the parties were cast as adversaries in the first action. *Id.* (citing Restatement (Second) of Judgments, § 27 (1982)).

All of these elements were satisfied by A&W in this case. *See also In re Limbaugh*, 155 B.R. 952, 956, 7 Tex. Bankr. Ct. Rep. 254 (N.D. Tex. – Dallas 1993) (opinion by J. McGuire). *Cycles, Ltd. v. Navistar Financial Corporation*, 37 F.3d 1088, 1090 (5th Cir. 1994); *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1991 (5th Cir. 1982). A federal court lacks jurisdiction to entertain collateral attacks on prior state court judgments under the *Rooker-Feldman* doctrine.[11]

The bankruptcy court correctly found and concluded that issue preclusion could properly be applied in this case under

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[11] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 444 S. Ct. 149, 68 L. Ed. 362 (1923); *Dist. of Col. Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).

the precepts of *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991), and *State Farm Fire and Cas. Co. v. Fullerton*, 118 F.3d 374, 383 (5th Cir. 1997)(quoting *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 n. 7 [Tex. 1994]) [Appendix H, pg. 126].

Goldblatt fully litigated his defenses in state court to all of A&W's claims. Those claims or issues were determined against him by a lawful and final judgment. Thus, it is *impermissible* (as well as disingenuous) for Goldblatt to now assert in this court that:

> (1) the state court judgment was "factually flawed and legally erroneous." or
>
> (2) that his actions against A&W were due to "just cause or excuse." or
>
> (3) that the findings in the trial court judgment does not support the requirements of § 523(a)(6)." or
>
> (4) that the bankruptcy court relied on Texas law rather than federal bankruptcy law in determining that the debt was non-dischargeable.

The bankruptcy court properly gave Mr. Goldblatt due consideration for each of his claims and defenses to A&W's complaint and properly determined that they did not have merit, and were not established. Consequently, there is no purpose in revisiting those failed defenses again in this proceeding.

## III. The Petition Does Not Merit Discretionary Review

Goldblatt's application for writ of certiorari does not merit review by this Honorable Court as the decision below is not in a real or direct conflict with a decision of another Circuit. The bankruptcy court's decision has not departed from the accepted and usual course of judicial proceedings that would require this Court's supervisory power. Further, the bankruptcy court's decision has not decided an important federal question in a way that conflicts with other relevant decisions of this Court. Supreme Court Rule 10.

While Goldblatt attempts to complain of imagined error, due to adverse decisions by the state trial court and the bankruptcy court, in the end those decisions were lawfully and correctly made by Judges who had the power to make those decisions in trials or hearings that afforded Goldblatt all rights to which he was entitled. The process was fair, both procedurally and substantively, and was not unconstitutional. Goldblatt had his day in court, and the lower court decisions were decided correctly in accordance with applicable law.

The United States Supreme Court is not in the business of error correction, as that is the express function of the Court of Appeals. There are no "compelling reasons" that have been set out in Goldblatt's Petition that warrant review by this Court. Supreme Court Rule 10. The case may be important to Goldblatt, but it does not decide an issue that is important to the jurisprudence of the United States, or the Circuit Courts of Appeal.

As to the question of whether the decision by the bankruptcy court that was affirmed by the court of appeals,

presents a real, *direct* conflict with the other circuits,[12] A&W would show the following:

The Fifth Circuit allows proof of willful and malicious acts under a two-pronged test. The injured party must establish that the injury that was sustained was based on either a *subjective* motive to act willfully and maliciously, or an *objective* substantial certainty of harm. Satisfying either prong in this test can result in a finding of willful and malicious conduct for intentional injury under the Court's holding in *Kawaauhau v. Geiger.*[13] The first part of the prong rests on the actor's state of mind, while the second prong can be established in the face of an actor's protestations that he had no evil motive or ill will, but that his actions are substantially certain to, in fact, cause injury or harm to the other party because they are a natural and probable consequence of that conduct. *Kawaauhau* resolved the conflict between the Eighth Circuit and the Sixth and Tenth Circuits by approving the holding in the Eighth Circuit. The holding in *Kawaauhau* does not say that objective findings are disapproved, or not allowed. However, Mr. Goldblatt wants to put a gloss on that holding so that *Kawaauhau* would require a narrow, constricted application, as suggested by the Ninth and Tenth Circuits. The latter circuits require that the actor's subjective state of mind must know that harm will follow, or that it is substantially certain to follow from the actor's intentional conduct, before the debt is excepted from discharge. *Carrillo v. Su,*[14] and *Moore v. Panalis.*[15]

12. Supreme Court Rule 10(a).

13. *Miller* at pg. 603.

14. 290 F.3d 1140 (9th Cir. 2002).

15. 357 F.3d 1125 (10th Cir. 2004).

In the first place, the *Miller* case was decided in 1998, while the *Carrillo* and *Moore* cases were decided very recently. Thus, *Carrillo* and *Moore* are the cases which conflict with Miller, and not the other way around. Second, both cases involved either a traffic accident or a claim for misrepresentation as to whether insurance coverage existed concerning the claimant's oil field injury. Neither case had anything to do with whether the debtor willfully and maliciously intended to injure the creditor, as is true in this case. Here, there is an active, targeted conspiracy by Goldblatt and others to defraud A&W out of the business it lawfully purchased from Wilbert for $323,000. For Goldblatt to claim that he had "legal justification" to perform these wrongful acts is the epitome of chutzpah.

The Fifth Circuit Court's objective standard is simply a recognition as to the efficacy of the role that a fact finder can play in resolving factual disputes that are at the heart of the ultimate issue of willfulness and malicious acts that intentionally injure the creditor. The shallow analysis that Mr. Goldblatt offers as to the holdings in the other circuits does not demonstrate that any real conflict exists between either the Fifth Circuit and the Sixth, Ninth, and Tenth Circuits.

The last paragraph of Supreme Court Rule 10 expressly provides:

> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Neither circumstance is true in this case. But, even if the point were conceded (which it is not), such matter does not constitute grounds for granting the writ in this case.

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari filed herein by Petitioner be denied.

Respectfully submitted,

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